

REMARKS

Applicant has reviewed the Final Office Action of April 9, 2008 and the Advisory Action of July 29, 2008. No claims are amended or cancelled. Claims 43-51 are pending. Reconsideration of the application is requested.

Claims 43-51 were rejected under 35 U.S.C. 101 as allegedly claiming the same invention as claims 1-16 and 26-39 of prior U.S. Patent No. 6,749,804.

Claims 43-51 were rejected under 35 U.S.C. 101 as allegedly claiming the same invention as claims 1-12 and 20-30 of U.S. Patent No. 6,616,892.

Applicant traverses the two double patenting rejections together.

Applicant reiterates that the test for double patenting under 35 U.S.C. 101 is whether a claim in the application could be literally infringed without literally infringing a corresponding claim in the patent, or vice versa. MPEP § 804(II)(A). *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970). If the answer is yes, then identical subject matter is not present and double patenting has not occurred. As explained in previous responses, identical subject matter is not present because lowering the pH is distinguishable from ammonia and odor reduction. In particular, ammonia and odors can be reduced without lowering the pH to less than 5. Thus, identical subject matter is not present and § 101 does not apply.

The Examiner appears to be inconsistently considering the claim preambles of the reference claims to be claim limitations while not considering the claim preamble of instant independent claim 43 to be a limitation. Applicant submits that the preamble of claim 43 should be considered a limitation.

The Examiner asserts in the Advisory Action that the claimed method of controlling Darkling beetles is not patentably distinct from the claims of the '804 and '892 patents and that "it would have been obvious to treat an animal habitat with TCM at a concentration of 100 to 200 as recited in claim 1 of the '804 patent". If this is the Examiner's reasoning, Applicant submits that the claims should instead be rejected under the doctrine of non-statutory obviousness-type double patenting. A Terminal Disclaimer can be filed to overcome such a rejection and can be filed in response to the Examiner's next office action.

Applicant submits that the instant claims 43-51 do not recite identical subject matter. Withdrawal of the § 101 rejections based on the '804 and '892 patents is requested.

CONCLUSION

For the reasons detailed above, it is respectfully submitted all claims remaining in the application (Claims 43-51) are now in condition for allowance. Withdrawal of the rejections and issuance of a Notice of Allowance is requested.

In the event the Examiner considers personal contact advantageous to the disposition of this case, he is hereby authorized to call Richard M. Klein, at telephone number 216-861-5582, Cleveland, OH.

Respectfully submitted,

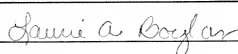
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September 9, 2008

Date

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